IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1947

Criminal Action No. 294-48

THE UNITED STATES OF AMERICA

v.

MARYLAND & VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on April 27, 1948. A notice of appeal is presented to the District Court herewith, to wit, on May 11, 1948.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U.S.C. Supp. 682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, as amended, 28 U.S.C. 345.

STATUTE INVOLVED

Section 3 of the Act of July 2, 1890, 26 Stat. 209, 15 U.S.C. 3, known as the Sherman Act, provides as follows:

> Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

THE ISSUES AND THE RULING BELOW

The indictment, which is in one count, was returned on March 8, 1948. It names as defendants the Maryland and Virginia Milk Producers Association, Inc., an association of milk producers; B. B. Derrick, secretary-treasurer of the Association; and seven corporations engaged in the business of purchasing milk and cream and selling fluid milk and cream and milk products to consumers and other purchasers in the District of Columbia and nearby parts of Virginia and Maryland. The seven corporate defendants are referred to as defendant distributors.

POOR COPY

BLEED THROUGH

The indictment may be summarized as follows:

The defendant Association has as members approximately 1500 producers of milk located in the States of Maryland and Virginia, who supply approximately 80% of the total amount of milk sold to distributors in the Washington metropolitan area.[1] The defendant distributors buy and resell approximately 86% of the total amount of milk supplied from all sources to the Washington metropolitan area.

The indictment charges that the defendants have engaged in a conspiracy, beginning about the year 1930 and continuing to the date of the indictment, to eliminate and suppress competition in the sale of milk to and the purchase of milk by defendant distributors, and in the sale of fluid milk [2] and cream and milk products by defendant distributors to consumers and other purchasers in the Washington metropolitan area, in restraint of trade and commerce in milk products within the District of Columbia and between the District of Columbia and States of the United States, in violation of Section 3 of the Sherman Act.

Defendants' conspiracy has consisted of continuing agreement and concert of action among them, the terms of which are, among others:

That the defendant distributors enter into contracts and agreements with the Association to purchase their entire requirements of milk from the

---

[1] The Washington metropolitan area is defined as the District of Columbia and nearby areas within Montgomery and Prince Georges Counties, Maryland, and Arlington and Fairfax Counties, Virginia, and the City of Alexandria, Virginia.

[2] Fluid milk is defined as milk sold by distributors in fluid form for human consumption.

Association to the extent it is able to supply said requirements, and to cease and refrain from the purchase of milk from producers not members of the Association, and from other sources; and that the Association agree with defendant distributors to supply them with their full requirements of milk to the extent the Association can so do;

That the Association charge each defendant distributor the same price as is charged to each other defendant distributor; and that the defendants agree that the Association refuse to supply milk to any distributor who has not agreed to purchase his full requirements from the Association, at prices as low as those charged to defendant distributors;

That the defendants agree upon a classification of milk into three classes governed and determined by the use to which milk is put by the defendant distributors; that the defendants agree upon the price to be paid by defendant distributors to the Association for each class of milk; and that the defendants agree that the defendant distributors shall not resell as fluid milk any milk which is purchased by them at a price below that charged for Class I, or highest priced class;

That the Association persuade and induce the Health Department of the District of Columbia to prevent the importation of milk from States other than Maryland and Virginia;

That the defendants agree to abandon and cause to be terminated a federal milk marketing order affecting milk prices in the Washington metropolitan area following determination by the defendants that this order, if continued, would result in a reduction in the price to be paid by distributors, and in the price to be charged to consumers, for milk;

POOR COPY

BLEED THROUGH

that the defendants agree to persuade and induce the Virginia Milk Marketing Commission to promulgate orders fixing minimum prices applicable to the purchase of milk and to the sale of fluid milk and cream by distributors in Arlington County and in Alexandria, Virginia; and that the defendants agree to adopt and apply to purchases of milk for resale in the District of Columbia the minimum prices so established by the Virginia State Milk Marketing Commission;

That the defendants discuss and agree upon the prices at which the defendant distributors shall sell fluid milk and cream to consumers and other purchasers in the Washington metropolitan area;

That the defendants agree that whenever the amount of milk available for sale by the Association exceeds the amount which defendant distributors can resell as fluid milk at the prices agreed upon, the defendants will remove the excess from the market by converting it into products other than fluid milk, even though defendant distributors might suffer a financial loss thereon;

That the defendants agree that the Association will prevent and eliminate competition from distributors who do not have full-supply contracts with the Association, and eliminate and suppress competition in the sale of fluid milk and cream by distributors, by inducing and persuading distributors not to cut prices; by attempting to deprive price-cutting distributors of an adequate supply of milk; by supplying milk to defendant distributors at cut prices for use by them in taking away business from price-cutting distributors; by interfering with the ability of producers to transport milk to price-cutting distributors; by forcing price-cutting

distributors into bankruptcy; and by other means.

The indictment also alleges that the purpose and effect of the conspiracy have been, among other things, to create in the Washington metropolitan area a rigid and artificial pricing structure in the sale of fluid milk, which has increased its price to consumers and other purchasers, and has insulated it from the normal influences which determine prices.

Defendant B. B. Derrick filed a motion to dismiss the indictment upon the ground that it "is bad in substance in that it charges acts by an agriculture co-operative which are immune from prosecution under the Anti-trust Laws by reason of" Section 6 of the Clayton Act, 15 U.S.C. 17, Sections 1 and 2 of the Capper-Volstead Act, 7 U.S.C. 291-292, and the Agricultural Adjustment Act, 7 U.S.C. 602, *et seq.* A memorandum of points and authorities attached to this motion shows that it is grounded solely on the contention that the acts charged in the indictment are exempted from the Sherman Act by provisions of the Clayton Act, the Capper-Volstead Act, and the Agricultural Adjustment Act.

Simpson Brothers, Inc., one of the defendant distributors, filed a motion to dismiss the indictment upon the ground that it was duplicitous. This defendant also moved to dismiss on the ground that the indictment "does not state facts sufficient to constitute an offense against the United States." The points and authorities cited thereunder are Section 12 of the Clayton Act, *United States* v. *Hutcheson,* 312 U. S. 219, which dealt with exemptions from the Sherman Act given by the Clayton Act, and four decisions of state courts holding cer-

POOR COPY

BLEED THROUGH

tain marketing agreements entered into by agricultural co-operatives not in illegal restraint of trade under either state or federal law.

The district court, after hearing argument on the motions, rendered an oral opinion holding that the indictment is not duplicitous but that it is bad in substance because it fails to charge a crime. The court stated that while agricultural co-operatives are not wholly exempt from the Sherman Act, "the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Section 3 of the Sherman Act, in the view that I take of that Act and other Acts referred to in the argument and judicial precedents presented." The court further stated that its holding as to invalidity applied to all the defendants.

The judgment which the court entered granted the motions to dismiss filed by B. B. Derrick and Simpson Brothers, Inc., and also dismissed the indictment "as to all remaining defendants."

It is clear that the district court dismissed the indictment solely upon the ground that the facts charged therein have been withdrawn from the prohibitions of the Sherman Act by later federal legislation. The decision was therefore "based upon the [invalidity or] construction of the statute upon which the indictment [or information] is founded," within the meaning of the Criminal Appeals Act, and an appeal lies to this Court. *United States* v. *Borden Co.*, 308 U. S. 188, is squarely in point as to the Government's right to appeal to this Court.

In the *Borden* case, as here, the principal defendants were distributors of milk in a city marketing area (Chicago) and a co-operative association of milk producers from which the distributor defend-

ants purchased most of their milk. In the *Borden* case, as here, the defendants were charged with conspiring to restrain trade and fix prices in the sale of milk from producers to distributors and in the sale of milk by distributors to consumers and others, and with conspiring to limit the supply of milk moving into the city marketing area in question.[3] In the *Borden* case, as here, the district court held that, because of the effect of Sections 1 and 2 of the Capper-Volstead Act and the Agricultural Marketing Agreement Act of 1937,[4] the indictment did not charge an offense under the Sherman Act. This Court, in upholding an appeal to it from this decision, said (p. 195):

> This was necessarily a construction of the Sherman Act. [Citing cases.] We are not impressed with the argument that the court simply construed the later statutes. The effect of those statutes was considered in determining whether the Sherman Act has been so modified and limited that it no longer applies to such combinations and conspiracies as are charged in counts one, two and four. Thus the Sherman Act was not the less construed because it was construed in the light of the subsequent legislation.
>
> We have jurisdiction under the Criminal Appeals Act to determine whether the con-

---

[3] The indictment in the present case charges an over-all conspiracy among the defendants, whereas the indictment in the *Borden* case charged, in counts one, two, and four, three separate conspiracies among the defendants. Count three of that indictment, which the district court held to be duplicitous, is not presently relevant.

[4] This Act amended and reenacted the provisions of the Agricultural Adjustment Act of 1933 authorizing the Secretary of Agriculture to issue milk marketing orders (50 Stat. 246).

POOR COPY

BLEED THROUGH

struction thus placed upon the Sherman Act is correct.

The holding in the *Borden* case that there is a construction of the statute on which the indictment is founded when an indictment charging violation of the Sherman Act is dismissed upon the ground that later legislation has exempted from that Act the conduct charged in the indictment is, of course, controlling as to the Government's right to appeal to this Court in the instant case, although here, but not in the *Borden* case, Section 6 of the Clayton Act was included among the later legislation which, as interpreted by the district court, immunized the acts charged in the indictment.[5] The principle is the same whether the district court's holding as to immunization is based upon one, two or three subsequent federal statutes.

For further authorities as the Government's right to appeal to this Court, see *United States* v. *Hastings*, 296 U. S. 188, 194-195; *United States* v. *Lepowitch*, 318 U. S. 702, 703-704. Cf., *United States* v. *Wayne Pump Co.*, 317 U. S. 200; *United States* v. *Swift & Co.*, 318 U. S. 442.

---

[5] In the *Borden* case this Court said (pp. 191-192) that the district court, "according to the formal terms of its judgment," held that the defendant agricultural cooperative was exempt from prosecution under Section 1 of the Sherman Act by Section 6 of the Clayton Act, as well as Sections 1 and 2 of the Capper-Volstead Act and the Agricultural Marketing Agreement Act, but this Court later said (p. 196) that the district court had not held that Section 6 of the Clayton Act rendered the cooperative immune from prosecution under the Sherman Act for its alleged participation in the conspiracies charged in counts one, two and four of the indictment.

THE QUESTIONS ARE SUBSTANTIAL

Insofar as the district court based its decision on the immunizing effects of the Capper-Volstead Act or the Agricultural Adjustment Act, its decision seems to be a clear misapplication of the interpretation placed upon these statutes in the *Borden* case (308 U. S. 188, 196-206). While the oral opinion of the district court does not disclose the grounds upon which it distinguished the present case from the *Borden* case, its construction of the foregoing statutes clearly presents a substantial question.

We also submit that insofar as the district court based its decision on the immunizing effect of Section 6 of the Clayton Act, its construction of that Section, which we believe to be clearly erroneous, presents a question of substance. What the indictment charges is a conspiracy between an agricultural cooperative and various distributors of milk who purchase from this cooperative, to fix the price at which such distributors sell milk, to control their disposition of milk, and to suppress the competition of, and to cut off supplies of milk from, other distributors.

Since Section 6 of the Clayton Act applies *pari passu* to labor organizations and agricultural organizations, the decisions dealing with the application of the Section to labor organizations are in point; they show that Section 6 does not exempt from the antitrust laws the conspiracy charged in the present case. In *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797, 808, this Court held that Congress never intended that the exemptions from the antitrust laws given by the Clayton Act should permit labor unions to "aid non-labor groups to

POOR COPY

BLEED THROUGH

create business monopolies and to control the marketing of goods and services." Accord, *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 400. In the Allen Bradley case the Court, after pointing out that Section 6 applies to labor or agricultural organizations "instituted for purposes of mutual help," said (p. 808):

> But "the purpose of mutual help" can hardly be thought to cover activities for the purpose of "employer-help" in controlling markets and prices. And in an analogous situation where an agricultural association joined with other groups to control the agricultural market, we said:
>
> "The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy *with other persons* in restraint of trade that these producers may see fit to devise." *United States* v. *Borden Co.*, 308 U. S. 188, 204-205. (Italics supplied.)

The questions presented by the present appeal are precisely like those presented by the appeal in the *Borden* case. The allowance of that appeal constitutes an affirmation that the questions are substantial.

This appeal presents the further substantial question, upon which this Court has not passed, as to the extent to which a farm cooperative may lawfully go in eliminating competition from producers not members of the cooperative, and among distributors, through the use of exclusive dealing contracts and other trade-restraining practices as charged in the indictment.

The questions here presented are involved in other pending proceedings brought by the United

States under the Sherman Act and authoritative determination of these questions will be of great aid in the administration of the Act.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

May 11, 1948.

BLEED THROUGH POOR COPY

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM 1947

Criminal Action No. 294-48

UNITED STATES OF AMERICA

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

OPINION OF COURT

KEECH, *J:*

The motion to dismiss is in two parts; one, that it is duplicitous, and the other that the indictment is bad in substance.

The Court holds that the indictment is not duplicitous.

As to the second ground, namely, that this indictment does not charge a crime, the Court grants the motion to dismiss, believing that there has been a failure to set forth sufficient facts.

In doing this, I am not holding that the Sherman Act would not under any circumstances be applicable to a case involving a cooperative. I recognize and subscribe—as I must— to the determination in the *Borden* case, which holds that cooperatives are not exempt from the Sherman Act. I merely hold that the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Sec. 3 of the Sherman Act, in the view that I take of that Act and other Acts referred to in argument and judicial precedents presented.

MR. WINN: Exception. That there are not adequate facts pleaded to make an offense.

MR. SEAL: That goes to all the defendants?

THE COURT: Yes, sir.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 792890 58